

(ii) Insurance Expense

63. Comsat also requests that the Commission include a surcharge for insurance expenses that Comsat has incurred on the deployment of INTELSAT satellites. Comsat states that it has traditionally purchased space-segment insurance on its own because, until very recently, INTELSAT did not fully insure total satellite deployment costs.¹⁶⁷ Comsat states that it has purchased launch and post-separation insurance coverage to protect against possible losses associated with a launch or in-orbit failure of a satellite, to the extent INTELSAT had not fully purchased such insurance.¹⁶⁸ Comsat also states that it purchased insurance to provide coverage against the cost of insurance premiums, to the extent INTELSAT has not chosen to cover the insurance premiums.¹⁶⁹ According to Comsat, INTELSAT has underinsured or not insured the costs of satellite deployment in the past because INTELSAT did not have to raise equity in the capital market, and thus did not manage its investment risk in the same way that commercial companies do.¹⁷⁰ Comsat states that as an equity investor, it bears a portion of the risk of INTELSAT launch failures or malfunctions in orbit, and thus has consistently purchased insurance to the extent INTELSAT has not.¹⁷¹ Otherwise, Comsat states, losses associated with uninsured portions of INTELSAT's space segment would reduce IUC-provided returns.¹⁷² Comsat argues that absent a surcharge, U.S. direct access users would obtain a free ride on Comsat's insurance payments.

64. Comsat filed a schedule listing the satellites that have been under-insured, along with the depreciation life for how much insurance expense remains capitalized on its financial statements.¹⁷³ Comsat states it has \$31 million of capitalized insurance remaining as of December 31, 1998. Comsat asserts that the actual expenses attributed to this capitalized insurance would be \$13.158 million, which includes the following components: \$3.872 million representing the rate of return on the capitalized insurance, assuming a 12.48 percent rate of return that Comsat asserts it could have earned; \$7.777 million for depreciation expense; \$1.510 million for Comsat's corporate tax liability on the \$3.872 million. The total amount of \$13.158 million would represent approximately 8.5 percent of Comsat's 1998 IUC payments to INTELSAT.

65. The Networks argue they should not bear the burden of Comsat's insurance expense when it is not clear why most "satellite insurance costs" are not already recovered in INTELSAT's operating

¹⁶⁷ See Comsat comments at Appendix, Brattle Group Study at 35.

¹⁶⁸ See Comsat June 11 *Ex Parte* at Exhibit C (letter) and Brattle Group Study at 35.

¹⁶⁹ See Comsat comments at Appendix, Brattle Group Study at 35.

¹⁷⁰ Comsat June 11 *Ex Parte* at 9-10.

¹⁷¹ Comsat reply comments at 44.

¹⁷² Comsat comments at Appendix, Brattle Group Study at 35.

¹⁷³ See Comsat June 11 *Ex Parte* at Exhibit C.

expenses.¹⁷⁴ MCI WorldCom and BT North America assert that INTELSAT already fully insures its satellites and launches, and thus argue against a surcharge for insurance expense.¹⁷⁵ BT North America further states that BT does not incur any additional costs associated with satellite launch and insurance.¹⁷⁶

66. We find that Comsat should be entitled to a surcharge that recovers that part of Comsat's insurance expenditures attributed to INTELSAT not purchasing, or fully purchasing, launch and post-separation insurance. As we discuss below, Comsat was created by the Satellite Act to plan, initiate, construct, own, manage and operate with foreign governments a commercial communications satellite system.¹⁷⁷ That system became INTELSAT. As the U.S. Signatory in this intergovernmental organization, Comsat is required to make capital investments in the satellite system under the terms of the INTELSAT Operating Agreement.¹⁷⁸ In carrying out obligations particular to its role, Comsat must insure that the purposes of the Satellite Act are fulfilled. This may include taking steps to protect its investment if not otherwise protected by INTELSAT. We believe Comsat's action to purchase launch and post-separation coverage, to the extent INTELSAT does not, is prudent given the high risk nature of launching and operating satellites and the large amount of capital committed to the development, launch, and operation of INTELSAT's satellites. Otherwise, a launch or in-orbit failure could significantly jeopardize Comsat's investment in INTELSAT. As the U.S. Signatory to INTELSAT, we believe Comsat has a duty to protect its INTELSAT investment in order to serve the interests of the U.S. government and INTELSAT users in the United States. As a result, we find Comsat's action to fully insure against launch and in-orbit failures to be reasonably related to its Signatory responsibilities, and do not find this insurance expense to be discretionary in nature.¹⁷⁹ We believe direct access users that will gain access to INTELSAT facilities that have been partially insured by Comsat should, in turn, partially compensate Comsat for its insurance expenses.

67. Cable and Wireless states that the Commission has found in the past that permitting carriers to recover "embedded" or "opportunity" costs from rivals stifles the very consumer benefits that

¹⁷⁴ Network comments at 10-11.

¹⁷⁵ MCI WorldCom reply at 23; BT North America reply at 27.

¹⁷⁶ BT North America comments at 5-7.

¹⁷⁷ See discussion in paragraphs 158-162, *infra*.

¹⁷⁸ INTELSAT Operating Agreement at Article 6.

¹⁷⁹ We further note that Comsat's unique status as the U.S. Signatory to INTELSAT distinguishes Comsat from other common carriers. Therefore, our treatment of Comsat's insurance expense in this Report and Order is not binding precedent for our treatment of any cost incurred by any other common carrier. The Commission has determined on at least one occasion that regulations applicable to domestic local exchange carriers (LECs) are not suited to Comsat, in part, because of the differences between Comsat and domestic LECs. See Comsat Corporation, Policies and Rules for Alternative Incentive Based Regulation of Comsat Corporation, IB Docket No. 98-60, Report and Order, 14 FCC Rcd 3065, 3072 (para. 20) (1999) (declining to extend LEC price cap regulation to Comsat).

competition is intended to produce.¹⁸⁰ The argument here by Cable and Wireless, however, is not persuasive. Comsat explains that, in the past, INTELSAT did not have to raise capital itself in the financial markets. Thus, INTELSAT faced different incentives in managing its risks, and so had an incentive to be underinsured.¹⁸¹ Each INTELSAT Signatory was left to decide for itself how much risk it would choose to bear and how much to protect itself through purchase of insurance. Further, because the size of Comsat's ownership interest in INTELSAT is not affected by customers' decisions to access INTELSAT satellites directly or through Comsat, Comsat's investment obligations in INTELSAT to fund replacement for any in-orbit failure also remains the same. Therefore, because Comsat has this continuing investment obligation, its insurance of the risk associated with any in-orbit failure can be properly viewed as a Signatory expense that Comsat continues to bear, even if all its current customers were to use direct access.

68. We do not, however, include a surcharge for any insurance purchased to provide coverage against the cost of the insurance itself in the event of a launch or in-orbit failure. Of the \$30 million worth of total capitalized insurance amount stated by Comsat, approximately \$8.5 million represents insurance on insurance premiums. While we recognize the importance of purchasing insurance when INTELSAT has failed to fully do so, we find that Comsat did not need to fully insure the insurance premiums. The risk associated with the need to purchase insurance on insurance premiums could have reasonably been absorbed in the course of normal business operations.

(iii) Calculating Reasonable Surcharge for Signatory-Related Expenses

69. In the *Notice*, we asked Comsat to specify how it would allocate these recoverable costs between itself and Level 3 users if such expenses were allowed.¹⁸² We also asked Comsat to specify how any recoverable costs should be allocated among the different INTELSAT services.

70. Comsat submitted a variety of schedules depicting surcharge calculations.¹⁸³ As noted above, Comsat calculated the surcharge percentages based on what portion these expenses represented of the IUC payments, using 1998 data.¹⁸⁴ In its further response, Comsat argues that calculating the surcharge will be difficult, and will mirror the complex type of rate regulation that the Commission determined was unnecessary in the *Non-Dominant Order*, and it will necessarily entail periodic visits.¹⁸⁵ Comsat argues that if the surcharge falls short, the result would be below cost access by U.S.

¹⁸⁰ C&W comments at 4.

¹⁸¹ Comsat *Ex Parte* letter, July 11, 1999, at 9-10.

¹⁸² *Notice*, 13 FCC Rcd at 22037.

¹⁸³ See Comsat comments at Attachment 1 and Comsat June 11 *Ex Parte*.

¹⁸⁴ See Comsat comments at Exhibit 4.

¹⁸⁵ Comsat comments at 83.

carriers for INTELSAT space segment, and potentially divert traffic to INTELSAT from more efficient satellite service providers.

71. We find that a surcharge should be calculated by determining what percentage a given expense constitutes of the total IUC payments made by Comsat in a given year, and then applying this uniform percentage to IUC rates in the forward year. While we understand that Comsat's Signatory-related expenses and IUC revenues may change, thus affecting the size of the surcharge that Comsat receives from direct access users, we do not now anticipate any material changes in these factors.¹⁸⁶ In addition, we agree with several parties who argue that the Commission should not conduct a rate proceeding to determine the reasonableness of Comsat's potentially recoverable costs. Comsat has failed to provide any evidence on how a potentially insignificant shortage in the surcharge would lead to below cost access by U.S. carriers for INTELSAT space segment, or potentially divert traffic to INTELSAT from more efficient satellite service providers.

72. We find that a uniform surcharge of 5.58 percent over IUC rates would be reasonable, for any particular service, in order to compensate Comsat for these unavoidable Signatory function expenses. This surcharge is based on the finding that Comsat's Signatory function expenses represented 1.94 percent of Comsat's IUC payments to INTELSAT in 1998. We also will allow a surcharge of .05 percent for headquarter account expenses. Likewise, for Comsat's allowable insurance expenses, we find that a uniform surcharge of 3.59 percent over IUC rates be permitted in order to compensate Comsat for these insurance expenses. In total, we find a surcharge of 5.58 percent over IUC rates to be reasonable for the purpose of compensating Comsat for Signatory-related expenses. Appendix B, hereto, provides the information on calculating this surcharge.

73. Comsat also asks the Commission to consider the additional costs that it will incur by having to necessarily wait longer for payment from U.S. users of direct access since INTELSAT will first receive the funds. It argues that this poses additional costs on Comsat.¹⁸⁷ We do not find this argument to have merit, as customers will pay the surcharge at the time they pay IUC rates to INTELSAT.

(b) Return on Investment

74. Comsat asserts that IUC rates do not provide Comsat a reasonable, after-tax return on its investment.¹⁸⁸ Comsat states that the 18 percent provided through the IUC mechanism, as cited in the *Notice*, actually translates into a return well below that earned by other telecommunication services companies after taking into account a number of considerations. First, Comsat argues that the 18 percent return represents a pre-tax return, and thus ignores the corporate tax liability that Comsat

¹⁸⁶ However, as we explain below in paragraph 90, Comsat's initial surcharge tariff will be in effect for no more than one year. If Comsat wishes to continue imposing a surcharge it will have to file a tariff revision for the following year.

¹⁸⁷ Comsat reply at 48.

¹⁸⁸ Comsat comments at 68.

incurs on the return. After considering tax implications, Comsat states the post-tax return on its Signatory equity amounts to 11.2 percent. Second, the 18 percent return is on the book value of invested equity and ignores a capital base that should also include Comsat's liability for the portion of INTELSAT's debt which Comsat finances. Comsat asserts that when considering total capital, or the sum of equity and Comsat's share of INTELSAT's debt, the effective after-tax return will be less than 11.2 percent. Furthermore, asserts Comsat, when considering return on net plant as the measure for total capital employed, the post-tax return on net plant amounts to 9.2 percent. In sum, Comsat argues that whether the rate of return is based on equity, equity and debt, or net plant, the IUC-provided return is well below a compensatory return for a private firm subject to corporate tax liability,¹⁸⁹ and below the return that Comsat has been allowed to earn under the Commission's rate of return policies. For these reasons, Comsat requests that the Commission permit a surcharge to allow Comsat to earn a reasonable rate of return.

75. In response, most parties contend that IUC rates already include a generous rate of return.¹⁹⁰ MCI WorldCom states that INTELSAT pays Comsat an after-tax return on Signatory equity of 10.37-12.81 percent, which falls within the 11.48 - 12.48 percent return that Comsat has been permitted to earn under rate of return regulation.¹⁹¹ In addition, MCI WorldCom states that the relevant rate of return the Commission needs to consider is Comsat's pre-tax annual rate of return of 14-18 percent on Comsat's investment in INTELSAT, and not INTELSAT's rate of return on assets.

76. MCI WorldCom asserts that Comsat's election to have excess investment in INTELSAT demonstrates the attractiveness of this return.¹⁹² MCI WorldCom includes a press statement made by the Comsat CEO, that discusses Comsat's recent decision to increase its investment share in INTELSAT by approximately two percent. The press release states that "Comsat's increased share in INTELSAT makes good business sense, and the corporation expects to see a strong return on this investment."¹⁹³

77. In the *Notice*, we requested comment from Comsat and other parties on how our recent decision to reclassify Comsat to non-dominant carrier status for most of its services, as well as our pending consideration of incentive-based rather than rate of return regulation of Comsat's remaining dominant services, should affect our consideration of Comsat's cost recovery beyond those costs associated with its "statutorily imposed official Signatory functions."¹⁹⁴ BT North America responded that is ironic that Comsat seeks surcharges designed to provide a secure rate of return when in the

¹⁸⁹ *Id.*

¹⁹⁰ GE Americom comments at 11.

¹⁹¹ MCI WorldCom comments at 20.

¹⁹² MCI WorldCom reply at 19.

¹⁹³ MCI WorldCom *Ex Parte* letter, May, 21, 1999.

¹⁹⁴ *See supra* at ¶ 47.

Non-Dominant proceeding Comsat sought to end rate of return regulation and sought to price its services according to the demands of the marketplace.¹⁹⁵

78. Based on the record before us, we do not believe Comsat's request to permit a surcharge that would guarantee a particular rate of return above that already provided by IUC rates is reasonable for the following reasons. First, the return provided by IUC rates, which was between 14 and 18 percent in 1998, provides a market-based rate of return for Signatories, as determined by the INTELSAT Board of Governors, of which Comsat is a member. The INTELSAT Board of Governors acknowledges that a Signatory's ownership of INTELSAT may exceed its usage of INTELSAT services, and in such circumstances, IUC rates provide the only source of income on this excess ownership. We assume that the Board will establish IUC rates that reflect a market rate of return.¹⁹⁶ If IUC rates yield an unreasonably low rate of return, the INTELSAT Board would have every incentive to change its pricing strategy or cost management practices to increase this return. INTELSAT evidently considers the competitive environment and the needs of its customers in determining its prices.¹⁹⁷ For example, INTELSAT stated in its 1997 Annual Report that "over the past year, INTELSAT has worked to ensure that its pricing strategy is attractive to its increasingly diverse customer base."¹⁹⁸

79. Second, we agree that Comsat's election to have excess investment in INTELSAT demonstrates, at least to some degree, the attractiveness of IUC-based returns.¹⁹⁹ Comsat clearly has attributed Comsat's decision to increase its investment share in INTELSAT by approximately two percent to expecting a strong return on this investment, even though it had greater ownership than its usage required at the time. While Comsat states in its comments that it holds this surplus ownership to enhance its voting power (and the influence of the United States) within INTELSAT, and not solely for investment purposes, Comsat (in a March 30, 1999 press release titled, "Comsat Increases Ownership of INTELSAT System") strongly suggests that obtaining a reasonable return is also part of this business decision to maintain excess ownership.

80. As discussed in this Report and Order, our regulatory treatment of Comsat has changed considerably since the last time we considered direct access in 1984. In the *1984 Direct Access Order*, we found direct access would constrain Comsat to a post-tax rate of return well below that recognized by the Commission as necessary to its financial well-being. During that period, and up to

¹⁹⁵ BT North America reply at 29.

¹⁹⁶ Article 8(c) of the INTELSAT Operating Agreement provides that: in determining the rate of compensation for use of the capital of Signatories, the Board of Governors shall include an allowance for the risks associated with investment in INTELSAT and, taking into account such allowance, shall fix the rate as close as possible to the cost of money in the world markets.

¹⁹⁷ See 1997 Annual Report at 2 and 4.

¹⁹⁸ *Id.*

¹⁹⁹ MCI WorldCom reply at 19.

its recent reclassification as a non-dominant carrier, Comsat had been authorized to earn between 11.48-12.48 percent, post-tax, on its INTELSAT investment.²⁰⁰

81. That authorization changed, however, in April of 1998, when we reclassified Comsat as a non-dominant carrier on many routes, and eliminated rate-of-return regulation, so Comsat could price its services according to the demands of the marketplace. We found Comsat non-dominant after concluding that Comsat no longer held market power for services to the vast majority of its routes, and that the increasingly competitive international telecommunications market would best serve to prevent Comsat from charging unreasonable prices. Therefore, we agree with BT North America that it would not be appropriate to grant Comsat's request to permit a surcharge to secure a particular rate of return, as it is inconsistent with Comsat's request to end rate of return regulation in order to allow it the freedom to determine appropriate prices in these competitive markets.²⁰¹

82. In addition, we have no evidence of any Signatory receiving a surcharge so it could secure a higher rate of return than that provided by IUC rates. Parties note that there is no mark-up or surcharge to IUC rates in other countries that have permitted Level 3 direct access, such as Chile, France, Germany, the Netherlands, and the U.K.²⁰² PanAmSat notes that Canada recently adopted a direct access system that does not include any surcharge fee on direct access customers. Based on PanAmSat's knowledge, no other administrations assess a surcharge.²⁰³

83. Comsat also asserts that two other direct access-related factors increase Comsat's risk and thereby reduce its market return in INTELSAT. First, the limited liquidity faced by INTELSAT Signatories further increases the costs of its investment. Second, INTELSAT Signatories are jointly and individually liable for the entire system. These factors increase the risk, and the corresponding necessary market return, asserts Comsat.²⁰⁴ We do not find either of these factors to lie outside the normal business risks already assumed by Comsat today.

84. In sum, we believe that IUC rates are designed by INTELSAT to provide a reasonable rate of return. Furthermore, INTELSAT established IUC rates with the understanding that Signatories may own a greater part of INTELSAT than they actually use, and thus IUC-based returns would represent the only source of return on this excess investment. In addition, our decision to reclassify Comsat to non-dominant carrier status in April of 1998 underlies our conviction that rates should be determined by what the market will support. If Comsat believes that an IUC rate is too low, then it may work

²⁰⁰ 1984 Direct Access Order, 97 FCC 2d at 24.

²⁰¹ In those markets and routes where Comsat has continued to be dominant, we have replaced rate of return regulation with an alternative incentive based price regulation scheme. See *In the Matter of Comsat Corporation Policies and Rules for Alternative Incentive Based Regulation of Comsat Corporation*, IB Docket No. 98-60, 14 FCC Rcd 3065 (1999) ("*Comsat Incentive Based Order*").

²⁰² MCI reply at 18.

²⁰³ PanAmSat reply at 7.

²⁰⁴ Comsat reply at 48.

within its capacity as a Board member of INTELSAT to address any concerns it has with the return on investment provided by IUC rates.

(c) Corporate Tax Liability

85. Comsat also asserts that IUC rates do not allow Comsat to recover the corporate tax expenses that it will incur on any income derived through direct access. Comsat states that its marginal corporate income tax rate in the year 1998 was approximately 37.31 percent and its effective income tax rate was 25.95 percent.²⁰⁵ This includes federal, state, and local taxes. Comsat requests that a surcharge be added to IUC rates of 7.11 percent to 13.82 percent, depending on the rate of return Comsat is allowed to earn, in order to allow Comsat to recoup its corporate income tax expenses incurred on income derived through direct access.²⁰⁶ Other commenters in the proceeding, while generally opposing any surcharge, do not address the effects of corporate tax liability on Comsat's return.

86. We decline to adopt Comsat's suggestion to include a surcharge for Comsat's corporate income tax expense that it will incur on the income produced by direct access. It is true that as a tax-paying entity, Comsat cannot avoid paying federal, state and local income taxes on income derived from INTELSAT for direct access. The rate of return on equity which INTELSAT pays to its signatories, which is currently set at between 14 and 18 percent before tax by the INTELSAT board, is equivalent to a rate of return on equity to Comsat of about 8.78 to 11.28 percent after tax, based on Comsat's marginal income tax rate of 37.31 percent. Historically, as a dominant carrier, Comsat was rate regulated and was permitted to earn a rate of return of about 11.48-12.48 percent after tax.²⁰⁷ However, in 1998 we declared Comsat to be non-dominant and eliminated rate regulation for most services on most routes.²⁰⁸ Later we replaced Comsat's rate of return regulation on its remaining services along dominant routes with incentive based price regulation. In doing so, we allowed Comsat much greater flexibility to lower prices to meet competitive service providers, but we also clearly intended that Comsat not be guaranteed any particular rate or return on its Signatory equity or rate base.²⁰⁹ For this reason, we do not see any need to explicitly compensate Comsat by an addition to its surcharge for the taxes it would have to pay on the income it receives from INTELSAT.

(3) Implementation Procedures for Direct Access

²⁰⁵ See Comsat June 11 *Ex Parte* letter at Exhibit E.

²⁰⁶ Boll Affidavit Exhibits 1 and 3.

²⁰⁷ See *Communications Satellite Corporation Investigation into Charges, Practices, Classifications, Rates and Regulations*, Memorandum Opinion and Order, 68 FCC 2d 941 (1978).

²⁰⁸ *Comsat Non-Dominant Order*, 13 FCC Rcd 14083 (1998).

²⁰⁹ *Comsat Incentive Based Order*, 14 FCC Rcd at n. 200.

87. We have determined that a Comsat surcharge of 5.58 percent over IUC rates for INTELSAT service offerings would be reasonable for purposes of compensating Comsat for Signatory function expenses and insurance expenses related to its Signatory role.²¹⁰ As pointed out in our *Notice*, Comsat's current tariff "markup" (over the INTELSAT tariff rate) varies widely across services. Comsat's mark-up is based on factors such as the service provided, the length of the contract term, and the amount of capacity being purchased.²¹¹ The specific tariff examples cited in the *Notice* showed markups that varied from 18 to 63 percent for full-time video service, 38 to 270 percent for voice-international digital service, and 26 to 88 percent for data - international business service.²¹² For switched-voice service, the markup is highest for shorter term contracts, while the markup for full-time video and data - international business services is highest in long term contracts. Thus, the impact of a uniform markup of 5.58 percent may be particularly effective in lowering the rates for relatively short term switched-voice traffic contracts and long term full-time video and data contracts.

88. We conclude that, while a surcharge calculated as set forth in this Order is reasonable, based on the record in this proceeding, we do not prescribe this surcharge. Comsat may file a tariff for a different surcharge, provided its proposed surcharge is just and reasonable within the meaning of Section 201 of the Communications Act,²¹³ i.e., that the surcharge will not recover more than the share of its expenses for the direct Signatory-related expenses and its insurance expense that Comsat reasonably incurs as a result of its role as the U.S. Signatory to INTELSAT.²¹⁴ Accordingly, if any direct access customer believes that the surcharge is unjust and unreasonable, we will consider a complaint filed by that customer.²¹⁵ If we find that the surcharge is unjust and unreasonable, we will require Comsat to issue refunds as warranted.

89. The procedures for implementing direct access to the INTELSAT system from the United States, including the surcharge element, will consist of several elements. Following release and publication in the Federal Register of this Report and Order, the International Bureau shall issue a Public Notice establishing a 21-day period (from the date of the public notice) for eligible carriers and users to notify the Commission in writing that they want Level 3 direct access to INTELSAT. The

²¹⁰ Appendix B hereto provides the analysis calculating this surcharge.

²¹¹ See *Notice*, 13 FCC Rcd at 22050-22051 (Appendix B).

²¹² *Id.* Percentage mark-ups can be derived from Appendix B of the *Notice*. For example, the "tariff ratio" for a 5 year term, 2.048 MB/s IDR, 0-270 ckts, hemi/zone/spot coverage, is shown as 3.70. This is equivalent to a 270 percent mark-up $((3.70-1)/1 \times 100=270\%)$

²¹³ 47 U.S.C. § 201.

²¹⁴ Our action here is not a prescription merely because it specifies a particular surcharge level that we find reasonable. "No principle of law requires the Commission to engage in a pointless charade in which carriers are required to submit and resubmit tariffs until one finally goes below an undisclosed maximum point of reasonableness and is allowed to take effect." *In re Trans-Alaska Pipeline Rate Cases*, 436 U.S. 631, 653 (1978).

²¹⁵ See 47 U.S.C. § 208.

public notice also will specify the name and address for filing any such notification. The International Bureau will forward the names of all the eligible U.S. carriers and users to Comsat. Comsat shall be required to inform INTELSAT within ten days of receiving these eligible names that they are authorized to obtain Level 3 direct access from INTELSAT without further approval of the U.S. Signatory – Comsat – consistent with the procedures established by INTELSAT that permits "blanket authorizations" for Level 3 direct access.²¹⁶ Any eligible carriers and users, not part of the initial "blanket authorization" request sent to INTELSAT, may request that Comsat add them to the list of carriers and users eligible for Level 3 direct access "blanket authorizations." Comsat will be required to inform INTELSAT within ten days of receiving each such subsequent request. Within 60 days after publication in the Federal Register of this Report and Order, Comsat may file, on one day's notice, a tariff of the terms and conditions of surcharges applicable to U.S. Level 3 direct access customers, consistent with the findings in this Report and Order.²¹⁷ The carriers and users obtaining Level 3 direct access from INTELSAT shall pay Comsat the surcharge specified in Comsat's effective tariff that is applicable to the services obtained from INTELSAT. Finally, Comsat may establish reporting mechanisms with INTELSAT for the limited purpose of assuring that Comsat can identify the appropriate surcharge that U.S. direct access customers must pay Comsat upon receipt of service from INTELSAT under Level 3 direct access. Comsat may take appropriate steps through INTELSAT to terminate a customer's Level 3 direct access status for failure to pay the appropriate surcharge.

90. We also conclude that Comsat's initial surcharge rates should be in effect for no more than one year. A surcharge that is reasonable today may or may not be reasonable in the future. Comsat's Signatory-related expenses may vary from year to year, and its level of recovery of those expenses may also vary. Accordingly, we require Comsat to limit its initial surcharge to one year. If Comsat wishes to continue to impose a surcharge after that date, it may file a tariff revision reflecting a new surcharge that recovers no more than the share of direct Signatory-related expenses and its insurance expense that Comsat reasonably incurs as a result of its role as the U.S. Signatory to INTELSAT.

91. We also require Comsat to state in its tariff that this surcharge will not apply upon privatization of INTELSAT. This surcharge is intended to enable Comsat to recover its reasonable, prudently-incurred costs associated with acting as the U.S. Signatory to INTELSAT, direct Signatory-related expenses and Comsat's insurance expense reasonably incurred as a result of its role as the U.S. Signatory to INTELSAT. Once INTELSAT has been privatized, Comsat will no longer incur any costs associated with acting as the U.S. Signatory to INTELSAT, and so continuing to impose its surcharge will no longer be just and reasonable at that point.

92. In summary, we reach the following conclusions with respect to Comsat's surcharge: (1) a surcharge is just and reasonable, provided that it recovers no more than the share of direct Signatory-related expense and insurance expense that Comsat reasonably incurs as a result of its role as the U.S. Signatory to INTELSAT; (2) if Comsat wishes to impose a surcharge, it must file a tariff; (3) we find that a surcharge calculated as set forth in the appendices to this Report and Order are just and

²¹⁶ See *supra* at ¶ 9.

²¹⁷ In essence, Comsat will subsequently be allowed to charge a uniform surcharge of 5.58 percent over IUC rates charged by INTELSAT.

reasonable but Comsat is free to attempt to show that some other surcharge to cover the same expenses would also be just and reasonable; (4) Comsat's tariff must state that this surcharge will be in effect for no more than a year after the date that its tariff takes effect; and (5) if a Comsat customer believes that Comsat's surcharge recovers more than the direct Signatory-related expense and its insurance expense that Comsat reasonably incurs as a result of its role as the U.S. Signatory to INTELSAT, we will consider a complaint filed pursuant to Section 208 of the Communications Act.

93. Finally, a decision by Comsat not to file a tariff reflecting a surcharge to direct access users will not preclude the availability of Level 3 direct access to U.S. carriers and users of INTELSAT. Comsat's failure to file a tariff will result in direct access customers obtaining service from INTELSAT without a surcharge to Comsat.

(4) Potential Competitive Concerns Raised by Direct Access

94. The *Notice* requested comments on whether permitting direct access would result in competitive distortions in the U.S. market.²¹⁸ An important issue that we must consider is, to the extent that we do authorize direct access to INTELSAT, should we impose any limitations on which companies should be allowed to obtain direct access within the United States? In addition, the *Notice* specifically requested parties to address the potential effect of INTELSAT's immunities from suit and process and its immunity from Commission jurisdiction over rates and practices. Parties commenting on this issue address four areas: (1) foreign Signatory operation in the U.S. market through direct access; (2) immunity from suit and process; (3) immunity from Commission jurisdiction; and (4) immunity from taxation.

(a) Direct Access by Dominant INTELSAT Signatories

95. Comsat contends that with the introduction of direct access in the United States, foreign Signatories, and possibly U.S. carriers, could manipulate INTELSAT IUC rates to their advantage and cause competitive distortions in the U.S. market.²¹⁹ Comsat is concerned that a sufficient number of foreign Signatories could be enlisted by large international carriers to depress future IUCs in order to enjoy below cost access to INTELSAT.²²⁰ BT North America notes to the contrary, however, that downward pressure on prices, *in lieu* of artificially preserving high supply costs to carriers, is precisely the result the Commission would want to achieve.²²¹ In any event, the INTELSAT Board of

²¹⁸ *Notice*, 13 FCC Rcd at 22040-22041.

²¹⁹ Comsat comments at 67.

²²⁰ Comsat comments attaching "An Economic Assessment of the Risks and Benefits of Direct Access to INTELSAT in the United States," Professors Jerry Green and Hendrick S. Houthakker, Harvard University, and Johannes P. Pfeifenberger, The Brattle Group, December 21, 1998.

²²¹ *See Ex Parte Notification* from Cheryl L. Schneider and Eric H. Loeb, BT Group Legal Services, to Magalie Roman Salas, Secretary, Federal Communications Commission, (June 11, 1999) at 2.

Governors would ensure that carriers with "significant bargaining power" would not be able to negotiate "preferential IUC rates" with INTELSAT.²²²

96. While direct access will benefit U.S. carriers and users of INTELSAT services and, in turn, U.S. consumers, foreign Signatory operation in the U.S. market via direct access will pose competition concerns. There may be potential incentives for Signatories to depress IUC rates for direct access to uneconomically low levels, *i.e.* to levels that do not reflect INTELSAT's full costs of providing direct access in the U.S. market. As Comsat has argued, foreign Signatories desiring to begin or expand operations in the U.S. market may themselves wish to purchase direct access from INTELSAT in the United States.²²³ As such, they will find low prices for direct access in the U.S. to be in their economic interest. Because these same companies that might purchase direct access also have the ability, through their Signatory status, to influence direct access prices, they may be able to develop their U.S. activities at artificially low prices, which could have an adverse competitive impact on Comsat and other international service providers operating in the United States. The fact that the Signatories share in INTELSAT's costs and revenues will not likely offset the incentive to underprice direct access. Unlike Comsat, most foreign Signatories are vertically integrated firms for whom access to INTELSAT is not in itself the end product they sell to customers, but instead an input into telecommunications services they sell to retail consumers. Access for such Signatories is more a source of costs than a source of revenues. IUC rates are for them primarily a transfer price they pay to INTELSAT for access they use themselves, and any returns they lose due to a lower IUC they can, in turn, be made up by the lower "price" they pay for usage of INTELSAT. So long as their usage shares and ownership shares of INTELSAT are roughly balanced, Signatories who are also retail service providers will be unaffected by low IUC rates and have no incentive to resist lowering IUC rates where to do so is otherwise advantageous.

97. As we explained above, a dominant Signatory may have the opportunity to participate in an effort to reduce direct access prices to uneconomic levels based on its opportunity to exercise a vote in the INTELSAT Board of Directors. Under ordinary circumstances, such activities might raise antitrust concerns. However, in any discussions regarding reducing the IUC, this incentive is not tempered by potential antitrust liability since all Signatories enjoy immunity from antitrust liability for their Signatory related activities.

98. Because of the incentives for vertically integrated Signatories to favor artificially low direct access prices in markets where they themselves want to be direct access customers, we adopt restrictions on the participation of those Signatories in the U.S. market for direct access to INTELSAT. Specifically, we will not authorize any Signatory, other than Comsat, to purchase direct access in the U.S. for service to or from any specific foreign country in which the Signatory itself uses 50 percent or more of all INTELSAT capacity consumed in that country. This restriction will also apply to affiliates that are more than 50 percent owned by the respective Signatory. Thus, a Signatory carrier affiliate that takes for its own use 75 percent of the total INTELSAT capacity sold in a

²²² *Id.*

²²³ Green, Houthakker, and Pfeifenberger, "An Economic Assessment of the Risks and Benefits of Direct Access to INTELSAT in the United States," December 21, 1998 at 20.

particular foreign country would, along with any more than 50 percent-owned affiliate, be unable to purchase direct access from INTELSAT in the United States for the purpose of originating or terminating traffic to that country. The purpose of this approach is to limit Signatories' incentives to reduce prices for direct access to uneconomic levels. Signatories that do not bear a cost from uneconomic direct access prices by virtue of competition in their home markets, and that can benefit from such prices by consuming direct access in the U.S. market, will have incentive to favor low direct access charges by INTELSAT. That incentive is reduced when such Signatories cannot immediately benefit in their role as direct access consumers, and is greatly weakened (regardless of whether the Signatories purchase direct access in the U.S.) when low direct access pricing is a greater benefit to their competitors than it is to themselves.

99. We limit this restriction to cover Signatories' purchases of direct access for service from the United States into territories where they are dominant, i.e., use 50 percent or more of the INTELSAT capacity consumed in that territory. Nothing in this Report and Order prevents them from using direct access to provide service between the United States and countries in which the Signatory is not the dominant provider of INTELSAT service. The ability to provide such service likely presents a far weaker incentive for the Signatory to favor uneconomic pricing because of the reduced traffic it is likely to carry between the U.S. and areas where it is not a dominant incumbent telecommunications service provider.²²⁴ We therefore find the potential benefits for American consumers to outweigh the risks of uneconomic pricing in such cases. However, if our competitive concerns regarding dominant Signatories are not likely to be realized, we will reevaluate this decision. However, we will continue to monitor developments regarding direct access and INTELSAT privatization to determine whether

²²⁴ We recognize that for transport of telecommunications traffic between the United States and many countries there are alternatives to INTELSAT. The existence of such alternatives which include non-INTELSAT satellite services and underseas cables, could effect a dominant Signatory's incentive to reduce direct access prices to uneconomic levels. Thus, to the extent major traffic routes are likely to have the most communications transport alternatives, it is possible to argue that direct access to INTELSAT will be most desirable for transporting traffic not to major Signatory countries, but to smaller, so-called "thin-route" countries. Under such a theory, where transport alternatives are available to a dominant Signatory into its home country, it is possible that the Signatory's incentive to reduce direct access prices to uneconomic levels will be muted regarding traffic between the United States and its home country. On the other hand, in theory, such a Signatory could have a stronger incentive to reduce direct access prices for traffic between the United States and thin-route countries where the Signatory is not dominant.

Although this argument is not illogical, we think the small amount of traffic that carriers are likely to transport between the United States and thin-route countries where they are not dominant is unlikely to provide strong incentives to reduce direct access prices to anticompetitive levels. The greater traffic at stake between the U.S. and the home markets of dominant Signatories—and the enormous growth in such traffic as data markets expand—is more likely to provide non-trivial incentives to reduce direct access prices to uneconomic levels even in the presence of alternative means of communications transport. For that reason we adopt dominant Signatory limitation on buying direct access in the United States to serve their home markets and any other market where they use more than 50 percent of the INTELSAT capacity consumed, rather than prohibiting them from serving markets—many of them thin-route markets—in which they are not dominant.

the restriction we impose in this Report and Order on dominant Signatories should be modified or eliminated.

100. We note that, as explained in this *Order*, our analysis in this rulemaking proceeding is based on the long-established public interest standard.²²⁵ Pursuant to that standard, and as exemplified in a history of cases,²²⁶ our public interest analysis includes consideration of competition issues. The U.S. obligations under the 1997 WTO Basic Telecommunications Agreement do not affect the Commission's statutory obligation to apply a public interest analysis,²²⁷ and we are "entitled to apply competitive safeguards consistent with U.S. obligations."²²⁸ Thus, the approach we take here is not only a lawful exercise of our public interest authority, but it is also based on previous public policy in which we explained the necessity of maintaining the public interest by avoiding competitive harm.

(b) Immunity from Suit and Process

101. INTELSAT and its Signatories, including Comsat, enjoy three categories of immunities: (1) Immunity from jurisdiction, which prevents courts from considering lawsuits of any type against INTELSAT; (2) archival and testimonial immunity, which protects INTELSAT from being compelled to provide documents or testimony of its employees; and (3) immunity of assets, which prevents courts from enforcing monetary judgments against INTELSAT. INTELSAT's immunities derive from its status as an intergovernmental organization conferred upon it by the INTELSAT Agreement and by INTELSAT Headquarters Agreement. In *Alpha Lyracom Space Communications v. Comsat Corp.*, the court found that Comsat was a "representative of the Parties" under the INTELSAT Headquarters Agreement and, therefore, was immune from any type of suit and legal process in the U.S. for acts

²²⁵ "[A] public interest analysis is a valid exercise of U.S. domestic regulatory authority, required by the Communications Act and consistent with U.S. international obligations." *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket Nos. 97-142, 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 24040 (1997) (*Foreign Participation Order*).

²²⁶ "The Commission has applied a public interest analysis as part of its regulatory structure since the Communications Act was passed in 1934. In fact, consideration of the public interest is fundamental in carrying out the general powers of the Commission. We apply the public interest test in a number of different contexts to domestic and foreign applicants." *Foreign Participation Order*, 12 FCC Rcd at 24040-41. See also *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, Report and Order, 12 FCC Rcd 24094, 24185 (1997) (*"DISCO II"*).

²²⁷ *Foreign Participation Order* 12 FCC Rcd at 24041; *DISCO II*, 12 FCC 2d at 24185.

²²⁸ *Foreign Participation Order* 12 FCC Rcd at 24040-41.

taken in its official capacity as a Signatory, but not for those actions taken in its role as a common carrier.²²⁹

102. We have twice addressed the question of Comsat's immunity as relates to the U.S. market and determined that it is a clear advantage over competitors that do not enjoy similar protection.²³⁰ The 1997 *DISCO II Order* and our 1998 *Comsat Non-Dominant Order* found that Comsat's immunity protects Comsat in its broad Signatory activities from suits based on antitrust, tort and contract claims. Also, these immunities protect substantial commercial activities. As the U.S. Signatory, Comsat sits on the INTELSAT Board of Governors and participates in decision making on all matters related to the commercial operation of a satellite system. INTELSAT's financial, legal, operational, commercial, and strategic decisions provide the basis upon which Comsat offers service to U.S. consumers. These decisions entail the planning and procurement of satellites and development and pricing of services to be provided over the satellites to INTELSAT Signatories and direct access users. These are the same types of commercial activities undertaken by Comsat's competitors with one key difference: Comsat's competitors have no immunity from suit and legal process for these types of activities and are subject to U.S. competition laws, including U.S. antitrust laws. As a result, absent an appropriate waiver, we declined in our *DISCO II* decision to permit Comsat to provide INTELSAT services into the U.S. domestic market.²³¹

103. Several parties addressed the effect of INTELSAT's immunity from suit and process on the U.S. market if we permit direct access in the United States. PanAmSat maintains that the Commission should rely on recent amendments to the Foreign Corrupt Practices Act and declare that INTELSAT has no immunity from legal process in the United States.²³² Columbia argues that, at a minimum, the Commission should require INTELSAT to waive its immunity from law suits filed in U.S. courts if we permit direct access in the United States.²³³ Ellipso states that the U.S. should "encourage" such a waiver from INTELSAT and reserve the right to withdraw direct access if anti-competitive practices

²²⁹ See *Alpha Lyracom Space Communications v. Comsat Corp.*, 968 F. Supp. 876, 877 (S.D.N.Y. 1996), *aff'd*, 113 F.3d 372 (2d Cir. 1997). See also Headquarters Agreement between the Government of the United States of America and the International Telecommunications Satellite Organization, effective November 24, 1976, 28 U.S.T. 2248 (the "Headquarters Agreement") that provides that INTELSAT and the representatives of the parties and of the Signatories shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions, except as such immunity is waived by INTELSAT.

²³⁰ See *Comsat Non-Dominant Order*, 13 FCC Rcd at 14161-14163.

²³¹ *DISCO II*, 12 FCC Rcd at 24149. Comsat filed a petition for review of the Commission's *Report and Order* in the U.S. Court of Appeals for the D.C. Circuit (File No. 98-101). Comsat is challenging the Commission's authority to require it to waive its immunities as a condition to entry into the U.S. domestic market.

²³² PanAmSat comments at 7.

²³³ Columbia comments at 3 and 7-8.

result.²³⁴ Lockheed Martin states that because of INTELSAT's immunities, direct access could result in unfair competition and that this concern supports its contention that the U.S. should pursue privatization of INTELSAT rather than direct access.²³⁵ INTELSAT comments that, contrary to PanAmSat's assertion, INTELSAT's immunities remain intact under the recently passed amendments to the Foreign Corrupt Practices Act.²³⁶ Comsat concurs with other parties that market distorting and anti-competitive effects would result from INTELSAT's immunities if direct access were permitted in the United States.²³⁷ Comsat further contends that the Commission has no authority to abrogate these immunities and the amendments to the Foreign Corrupt Practices Act do not eliminate INTELSAT's immunities.²³⁸

104. MCI WorldCom contends that direct access would not raise competitive concerns for the U.S. market.²³⁹ MCI WorldCom states that it is the U.S. direct access customers who would be most affected by INTELSAT's immunities and INTELSAT provides recourse to these customers through arbitration in its standard direct access service agreement.²⁴⁰ MCI WorldCom also points out that, while Comsat argues against direct access based on INTELSAT's immunities, Comsat continues to maintain that the existence of its own derivative immunities should not deter the Commission from authorizing Comsat to provide INTELSAT services in the U.S. domestic market.²⁴¹ Finally, MCI WorldCom contends that the amendments to the Foreign Corrupt Practices Act provides for reduction or elimination of INTELSAT's immunities.²⁴²

105. In view of INTELSAT's immunities, we agree that we must protect competition in the U.S. international market upon implementation of Level 3 direct access. Protections are necessary, however, only to the extent introduction of direct access into the U.S. market for international services results in competitive distortions greater than already exist as a result of Comsat's immunities. Through Comsat, INTELSAT already is in the U.S. market providing space segment capacity for

²³⁴ Ellipso comments at 11.

²³⁵ Lockheed Martin comments at 14-15.

²³⁶ INTELSAT reply at 3-5.

²³⁷ Comsat reply at 28.

²³⁸ *Id.* at 28-33.

²³⁹ MCI WorldCom comments at 21-23.

²⁴⁰ *Id.* at 22.

²⁴¹ *Id.*

²⁴² *Id.* at 22-23; See also Comsat comments in Docket No. 990405086-9086-01 proceeding of NTIA, dated May 12, 1999, in which Comsat strongly disagrees there are competitive advantages. Comsat argues that its Signatory immunity concerns its conduct in INTELSAT, subject to government instruction and not its conduct in the market place.

international communications to U.S. carriers and users on a wholesale basis, by virtue of the Satellite Act and the INTELSAT Agreement.²⁴³ Comsat enjoys the same immunities as INTELSAT in its role as the U.S. Signatory to INTELSAT, but not in its role as a common carrier supplier of INTELSAT services. Both are protected from suit and process (including antitrust actions) in connection with INTELSAT commercial decisions described above that include development and pricing of services. The services and their prices are reflected in INTELSAT IUCs. However, U.S. carriers and users would pay IUC rates in order to take service from INTELSAT under Level 3 direct access.

106. Because immunity for the same activities extend to both Comsat and INTELSAT, we conclude that permitting Level 3 direct access in the United States is not likely to lead to any additional competitive distortions in the U.S. market for international services than already exists as a result of Comsat's provision of INTELSAT services in the U.S. market. Level 3 direct access customers would use the same services over the same facilities that result from commercial decisions for which both INTELSAT and Comsat are immune. These services are provided at IUC rates to direct access customers pursuant to standard agreements. Only if INTELSAT engages in additional commercial activities -- such as marketing to U.S. carriers services outside the terms of IUC rates -- could the current competitive situation possibly be further distorted. Any such activities, however, are consistent with that which Comsat performs in its common carrier role and for which it has no immunity.²⁴⁴ We would expect INTELSAT to voluntarily waive its immunity to cover the direct marketing of services and negotiation of agreements with U.S. carriers that would lead to the provision of services and rates not included in IUC rates or pursuant to the service agreements different from what INTELSAT generally offers under Level 3 direct access.²⁴⁵ We believe that this approach is consistent with our *DISCO II* decision in which we precluded Comsat from entering the U.S. domestic satellite market without a waiver of its privileges and immunities.²⁴⁶ Here, we permit Level 3 direct access only for services to and from the United States, and not for domestic service within the United States.

107. Comsat contends that its immunity as a Signatory can be distinguished because it allegedly does not involve marketplace conduct and is subject to government instruction. We have previously rejected this argument.²⁴⁷ Comsat's Signatory role entails substantial commercial decisions and

²⁴³ See *DISCO II*, 12 FCC Rcd at 24149.

²⁴⁴ See above discussion on Level 1 and Level 2 direct access arrangements. As noted above, Level 3 direct access would also allow customers to receive operational and technical information and meet with INTELSAT staff regarding capacity availability and tariff matters. However, these functions do not entail negotiations for new services and rates.

²⁴⁵ INTELSAT normally waives its immunities when entering into contracts or other commercial relationships, including procurement of satellites and financial arrangements with banks and financial institutions.

²⁴⁶ *DISCO II*, 12 FCC Rcd at 21149.

²⁴⁷ *Comsat Non-Dominant Order*, 13 FCC Rcd at 14161-14163; See also *DISCO II*, 12 FCC Rcd at 21149.

activities that are necessary and common to participation in the market place. The government instructional process was neither designed nor is it capable of supplanting the antitrust law as a deterrent to anti-competitive behavior. The instructional process is intended to assure fulfillment of U.S. policy goals under the Satellite Act of 1962.²⁴⁸

108. Finally, the provisions of the recently passed amendments to the Foreign Corrupt Practices Act ("the Anti-Bribery Act") cited by PanAmSat do not appear relevant to this proceeding.²⁴⁹ The Anti-Bribery Act amends the Securities Exchange Act of 1934 and the Foreign Corrupt Practices Act of 1977 to implement the OECD "Convention on Combating Bribery to Foreign Officials in International Business Transactions." The law includes Section 5, entitled "Treatment of International organizations providing Commercial Communications Services." Section 5 subjects INTELSAT to provisions of the Securities Exchange Act and Foreign Corrupt Practices Act until the President certifies they have been privatized in a pro-competitive manner. Section 5 also states that INTELSAT and Inmarsat shall not be accorded immunity from suit or legal process, except as required by international agreements to which the United States is a party. It requires the President to "expeditiously take full appropriate actions necessary to eliminate or to reduce substantially" all privileges and immunities of INTELSAT and Inmarsat not eliminated by the section (that is, privileges and immunities that remain as a result of existing international agreements). The President is to determine which agreements constitute international agreements for purposes of the section. In this proceeding the Commission is not authorized to make that determination.

(c) Immunity from Commission Jurisdiction over Rates and Practices

109. As an intergovernmental organization, INTELSAT is not subject to the jurisdiction of any national regulatory authority. In our *Notice* in this proceeding, we requested comments as to the potential effect on competition in the U.S. market in view of INTELSAT's immunity from Commission jurisdiction over rates and practices. We asked whether our authority to license earth stations pursuant to the *DISCO II* regulatory structure would be a sufficient means of overseeing INTELSAT direct access operations in the U.S. market, or whether other regulatory protections might have to be imposed.²⁵⁰

110. PanAmSat responded that, if we permit direct access in the United States, we should treat INTELSAT as any other similarly situated carrier, requiring it to file Title III applications with appropriate fees, subjecting it to Title II dominant carrier regulation with cost based tariff filing requirements, and enforcing our *DISCO II* "no special concessions policy."²⁵¹ Columbia requests that we require INTELSAT to demonstrate that its provision of services directly to U.S. customers will not

²⁴⁸ See *Communications Satellite Corporation*, 3 FCC Rcd 7108, 7109 (1988).

²⁴⁹ International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366 (1998).

²⁵⁰ *Notice*, 13 FCC Rcd at 22041.

²⁵¹ PanAmSat comments at 8.

have an adverse impact on competition.²⁵² Columbia contends that INTELSAT only would be able to make such a demonstration upon privatization. And Columbia contends that Commission earth station licensing authority would be inadequate to assure no competitive harm results in the U.S. market.²⁵³

111. INTELSAT, in response to PanAmSat, states that it does not operate as a carrier providing communications services, but "provides space segment required for international public telecommunications services" to Signatories and direct access users.²⁵⁴ INTELSAT also points out that it is not subject to Commission regulatory procedures with respect to use of orbital location and frequencies.²⁵⁵ MCI WorldCom contends that the Commission has statutory authority to regulate and impose any needed license conditions on the U.S. entities that have direct access to INTELSAT.²⁵⁶ Ellipso points out that the Commission has the right to withdraw direct access if it results in anti-competitive practices by INTELSAT.²⁵⁷

112. We disagree with PanAmSat that we should apply the full panoply of Commission regulatory authority to INTELSAT if we permit direct access in the United States. We decided in our *DISCO II* decision to permit foreign satellites to access the United States through earth station licenses.²⁵⁸ Our authority over earth station licensing provides the means by which to protect competition in the U.S. market. This is an approach readily applicable to INTELSAT in connection with direct access. Additionally, there is no basis for imposing common carrier regulation on INTELSAT. INTELSAT's operation as a provider of space segment capacity is a role similar to that of PanAmSat and other competing U.S. satellite systems. PanAmSat and other U.S. competing systems are not required to operate as common carriers.²⁵⁹ Nor do we impose common carrier regulation on non-U.S. licensed satellite operators providing service in the United States. PanAmSat provides no convincing argument why INTELSAT should be treated any differently if U.S. customers choose to obtain services directly from INTELSAT via Level 3 direct access. As MCI WorldCom noted, U.S. carriers obtaining service through Level 3 direct access will continue to be subject to the Commission's Title II jurisdiction.

²⁵² Columbia comments at 6.

²⁵³ *Id.* at 6-7.

²⁵⁴ INTELSAT reply comments at 7, citing the INTELSAT Operating Agreement, 23 U.S.T. 4091.

²⁵⁵ *Id.* at 6, citing the INTELSAT Agreement.

²⁵⁶ MCI WorldCom comments at 21-22.

²⁵⁷ Ellipso comments at 11.

²⁵⁸ *DISCO II*, 12 FCC Rcd at 24174.

²⁵⁹ *Establishment of Satellite Systems Providing International Communications*, 101 FCC 2d 1046 (1985), *recon.*, 61 Rad. Reg. 2d (P&E) 649 (1986), *further recon.*, 51 Fed. Reg. 17631 (1986) (summary only), *further recon.* 1 FCC Rcd 439 (1986).

113. We recognized in *DISCO II* that use of the INTELSAT system in the United States for international services is grounded in the policies of the Satellite Act, and concluded that we would continue to consider applications by Comsat to provide international services via INTELSAT on a case by case basis.²⁶⁰ In view of our findings above as to the limited effect of INTELSAT's immunities on the U.S. market under a direct access regime, and the need for INTELSAT to voluntarily waive these immunities in any situations in which it chooses to provide services not covered by IUC rates, we believe that we can protect competition in the U.S. market through our earth station licensing authority. We have the additional means through the U.S. government instructional process to require Comsat to inform INTELSAT that direct access must be discontinued in specific instances where competition problems arise. We therefore do not find it necessary, as Columbia contends, to await privatization of INTELSAT before allowing it direct access to the U.S. market.

(d) Immunity from Taxation

114. Comsat argues that INTELSAT's tax-exempt status under U.S. law would distort competition in the United States market since INTELSAT would enjoy an artificial cost advantage over Comsat and other U.S. satellite providers. Specifically, Comsat asserts that INTELSAT's exemption from property taxes, payroll taxes, corporate income taxes, and customs duties allows it to pass along cost savings in the form of artificially lower rates.²⁶¹ Because of this cost advantage, INTELSAT would likely capture business from other U.S. providers of space segment capacity, irrespective of whether INTELSAT is truly the most efficient services provider.²⁶² Columbia argues that the Commission should require INTELSAT to remove its tax exempt status from local, state, and federal taxes on its revenues, as well as assets, before offering Level 3 direct access service to U.S. users.²⁶³

115. We agree that direct access might create a temporary competitive distortion by allowing INTELSAT to provide service to U.S. users while being exempt from income taxes. However, we believe that U.S. customers of INTELSAT capacity and ultimately final consumers will gain from obtaining direct access to INTELSAT at low prices. Furthermore, by virtue of its treaty with the U.S., INTELSAT is exempt from U.S. taxes and the U.S. does not have authority to impose such taxes on INTELSAT. We are not aware of any other country in which INTELSAT pays taxes, and yet we have noted that 94 other countries permit direct access and that most of them do not impose any surcharge above the IUC for direct access. Hence, those countries have apparently found that allowing INTELSAT to have direct access even though it does not pay taxes does not raise problems sufficient to require either a tax surcharge or to prevent direct access. Thus, we do not see why INTELSAT's tax immunity in the U.S. should be sufficiently worrisome to either deny direct access or to cause us to require a surcharge payment to Comsat for taxes. In addition, when INTELSAT is privatized, it

²⁶⁰ *DISCO II*, 12 FCC Rcd at 24149.

²⁶¹ Comsat comments at 62.

²⁶² *Id.* at 63.

²⁶³ Columbia comments at 8.

will become subject to taxes just like any other company doing business in the United States or the country in which it is incorporated.

116. We do not believe it would be appropriate to adjust for INTELSAT's immunity from taxes by adding a surcharge for those taxes that would be payable to Comsat. The only appropriate adjustment for INTELSAT's tax immunity would be for it voluntarily to make payments in lieu of taxes to the appropriate federal and state taxing authorities, something which it has not agreed to do. Because we view any competitive distortion as being small, and of short duration, and because we believe the benefits of direct access far outweigh the costs, we are authorizing direct access without requiring a surcharge for taxes.

(5) Fresh Look

117. A number of proponents of direct access ask that the Commission permit a "fresh look" at long term carrier contracts between Comsat and AT&T and MCI WorldCom for the acquisition of INTELSAT space segment capacity.²⁶⁴ Fresh look would allow these carriers to either renegotiate or terminate those contracts in view of the availability of direct access to INTELSAT. Fresh look proponents contend that the full benefits of direct access will not be achieved if AT&T and MCI WorldCom remain bound by contractual obligations secured by Comsat when it was the only provider of INTELSAT service in the United States.²⁶⁵

118. The Commission has permitted the extraordinary remedy of fresh look in limited circumstances, to promote consumer choice and eliminate barriers to competition in markets where long-term business arrangements have essentially "locked up" service with a former monopoly telecommunications carrier. For example, the Commission initially applied fresh look in the *800 Portability Order*,²⁶⁶ where it allowed AT&T customers to terminate inbound 800 service from AT&T without termination liability within 90 days of 800 numbers becoming portable. This prevented AT&T from leveraging its market power in 800 service to sell other services to its customers. As a further example, the Commission also permitted fresh look in the *Special Access Expanded Interconnection Order*, which permitted special access customers to terminate certain long-term special access arrangements with LECs if those customers wish to obtain the benefits of new, more competitive alternatives. There, the Commission recognized that previously established long-term access arrangements would prevent customers from obtaining benefits of the new, more competitive interstate access environment.

²⁶⁴ AT&T comments at 13-14; ECG comments at 6; GlobeCast Reply at 5-6; ICG comments at 6; Loral Orion comments at 8; MCI comments at 24-28 and reply at 13-14; Network reply at 20; PanAmSat comments at 9-10; and Sprint comments at 10-13.

²⁶⁵ AT&T comments at 14-15. MCI WorldCom comments at 27-28.

²⁶⁶ Comsat reply at 59. See also *Special Access Expanded Interconnection Order*, 8 FCC Rcd at 7342 and 7346-7348.

119. In applying the fresh look doctrine in these instances, the Commission considered: (1) whether the entity holding the long-term contracts has market power and has exercised that power to create long term contracts to "lock up" the market in such a way so as to create unreasonable barriers to competition; and (2) whether the contractual obligations can be nullified without harm to the public interest.

120. Fresh look proponents argue that a direct access policy meets these standards because: (1) Comsat's provision of INTELSAT would have been open to competition through direct access; and (2) pre-existing contracts or arrangements would prevent customers from obtaining the benefits of direct access, thus inhibiting the development of a competitive market.²⁶⁷ With elimination of Comsat's *de facto* monopoly on the provision of INTELSAT space segment service in the United States, fresh look would allow customers to break their commitment to long-term contracts offering terms that are much less favorable than those under direct access.²⁶⁸ Absent fresh look they contend that full competition will unlikely develop until after these contracts expire, which extend up to 15 years.²⁶⁹ They also contend that Commission implementation of fresh look in this proceeding would be consistent with its previous decisions in the *800 Portability Order* and *Special Access Expanded Interconnection Order*.²⁷⁰

121. Comsat opposes the adoption of fresh look.²⁷¹ Comsat argues that prior Commission decisions allowing fresh look are inapplicable here and that the proponents of fresh look do not demonstrate that the criteria established by the Commission in applying fresh look in previous instances have been satisfied. Comsat states that the first test is not met because the Commission has determined that it lacks market power in most markets and that courts have also found that Comsat lacked power to compel carriers to enter into long term agreements.²⁷² Comsat argues that the second test is not satisfied because imposing fresh look will not serve the public interest. First, Comsat argues that negating these contracts would undermine its own and INTELSAT's planning and procurement of the global satellite system, since this planning was based on customer commitments under these long-term contracts. It also contends that eliminating these contracts would also undermine the benefits that these contracts have served in helping lower prices for all customers.

²⁶⁷ Loral comments at 8.

²⁶⁸ MCI WorldCom comments at 25-26.

²⁶⁹ *Id.* at 28.

²⁷⁰ See Loral comments at 8; MCI WorldCom comments at 26; and AT&T comments at 14.

²⁷¹ Comsat reply at 56. Comsat contends that because fresh look was not raised in the *Notice*, adoption would violate Administrative Procedure Act ("APA") procedures. See Administrative Procedure Act, 5 U.S.C. §§ 551-559. Comsat also maintains that Commission application of fresh look and portability, as discussed below, would constitute an unconstitutional taking. We do not address these contentions since we are not taking these actions in this proceeding.

²⁷² Comsat reply at 60-61.

122. Comsat also contends that prior decisions in which fresh look was granted suggest fresh look is not applicable here. Comsat states that fresh look was applied in the *Expanded Interconnection* proceeding because customers lacked competitive alternatives when they entered into contracts and required relief from their long-term obligations in order to be able to benefit from competition. In contrast, Comsat states that competitive alternatives to INTELSAT have been available for many years, and INTELSAT users have entered into alternative arrangements with fiber optic submarine cable operators as well as other space segment providers. Lockheed Martin states that fresh look was granted in the *800 Number Portability* proceeding so customers who were dependent on a specific 800 number could not be leveraged by AT&T into long-term commitments. Lockheed Martin states, in contrast to individualized 800 numbers, international satellite capacity is fungible.²⁷³

123. AT&T and MCI WorldCom entered into contracts with Comsat that expire in 2003.²⁷⁴ The contracts provide AT&T and MCI WorldCom with discounted rates for space segment capacity over Comsat's regular rates. The contracts represent approximately 50 percent of Comsat's revenues from the provision of INTELSAT service. We recognize that these long-term contracts prevent these carriers from taking full advantage of the benefits of direct access for that traffic already committed to long-term contracts. We find, however, that permitting Level 3 direct access does not meet the standards for applying fresh look.

124. Proponents of fresh look fail to meet the first test because the contracts have not "locked up" the market to such an extent that they create unreasonable barriers to competition. In the *Comsat Non-Dominant Order*, we noted that Comsat estimates that the three contracts represent approximately 25 percent of the U.S. switched voice service market. On a global basis Comsat now accounts for no more than a 15 percent average global market share of the transmission capacity utilized for switched-voice and private line services. This relatively low market share suggests that these long-term contracts have not acted as a barrier to further competition through fiber optic cable and satellite alternatives. While we found in the *Comsat Non-Dominant Order* that Comsat continues to be dominant in 63 thin route countries for switched voice and private line service, there is no evidence on the record in this proceeding to conclude that the existence of Comsat's long-term contracts create an unreasonable barrier to competition in these markets.²⁷⁵ We noted in the *Comsat Non-Dominant Order*, that the contracts only obligate AT&T and MCI WorldCom to transmit part of their international switched voice traffic using Comsat. We confirmed an earlier finding that Comsat's switched voice customers possessed significant bargaining power giving them the flexibility to route a significant portion of their switched voice traffic to their own transmission facilities or those of alternative carriers as they choose.²⁷⁶

²⁷³ Lockheed Martin reply at 15-16.

²⁷⁴ Agreement between AT&T and Comsat executed July 27, 1993, as amended; Agreement between Comsat and MCI executed April 8, 1993, as amended.

²⁷⁵ *Comsat Non-Dominant Order*, 13 FCC Rcd at 14141-14149. See also *infra* Appendix A.

²⁷⁶ *Comsat Non-Dominant Order* at 13 FCC Rcd at 14121.

125. We also find that the public interest is not served by nullifying MCI WorldCom and AT&T contractual obligations to Comsat. The long-term contracts between AT&T, MCI WorldCom and Comsat represent the current agreements that resulted from our 1988 decision to eliminate imposition of circuit distribution guidelines on AT&T's use of international transmission circuits in undersea cable and satellite facilities.²⁷⁷ The purpose of the guidelines had been to require U.S. international carriers to use INTELSAT in order to assure fulfillment of the objective of the Communications Satellite Act of 1962 -- establishment and operation of a global communications satellite system. Until 1988, the Commission required substantial use of INTELSAT by AT&T and other carriers which also had investment interests in submarine cables. It abandoned this policy in favor of long-term contracts between Comsat and U.S. carriers that assured continued use of INTELSAT based on carrier need, free of regulatory interference. Reliance on long-term contracts *in lieu* of circuit distribution guidelines was jointly proposed by Comsat and AT&T, supported by other carriers and by the Executive Branch.²⁷⁸ Accordingly, these contracts have been the basis for Comsat to in turn make commitments to INTELSAT on the acquisition of space segment capacity to be used to fulfill capacity requirements under the contracts. In view of this history, we will not apply fresh look to these contracts. AT&T and MCI WorldCom entered into them on their own accord based on business judgment, their benefit in terms of the elimination of a Commission policy they found undesirable, and for the ability to obtain discounted rates for commitments to purchase capacity over a period of years. Direct access clearly will result in significant additional benefits to U.S. carriers in use of INTELSAT. Therefore, we do not believe it would be reasoned decision-making to upset previous commitments freely entered into by all parties that formed the basis of a change in longstanding Commission policy. The historical basis for these contracts makes the issue before us here distinguishable from other instances in which we imposed fresh look.

(6) Portability

126. MCI WorldCom and Sprint ask the Commission to require portability of the INTELSAT space segment capacity controlled by Comsat.²⁷⁹ They argue that portability is needed to ensure that commitments for space segment capacity between Comsat and INTELSAT do not impair the implementation of direct access because Comsat has ownership of the vast majority of INTELSAT capacity accessible by U.S. users. Without direct access carriers and users being able to obtain sufficient space segment capacity to provide INTELSAT services, Comsat will maintain its *de facto* monopoly status. MCI WorldCom states that requiring portability is consistent with the Commission's obligation under the Satellite Act to "ensure that all present and future authorized carriers shall have

²⁷⁷ See *Policy for the Distribution of United States International Carrier Circuits Among Available Facilities during the Post-1988 Period*, 3 FCC Rcd 2156 (1988) ("*Circuit Distribution Decision*").

²⁷⁸ *Circuit Distribution Decision* at 2157.

²⁷⁹ MCI WorldCom comments at 29-30 and reply at 14; Sprint comments at 13. "Portability" refers to the right of a current customer of Comsat to obtain the transponder capacity it currently receives through Comsat and use it under a direct access to INTELSAT regime.

nondiscriminatory use of, and equitable access to" INTELSAT.²⁸⁰ It contends that portability of INTELSAT capacity is even more essential than number portability for local telephone service because a direct access customer cannot operate at all without availability of INTELSAT capacity.²⁸¹

127. Comsat opposes the Commission consideration of portability because the issue was not raised in the *Notice*, and thus would violate APA procedures.²⁸² Comsat also maintains that since there is no factual case for fresh look, by definition there is no case for portability either.²⁸³ Both Comsat and Lockheed Martin note that portability has not been required in other countries where direct access has been authorized. While INTELSAT has established procedures for direct access, nowhere in these procedures are applicants for direct access permitted to assume a right to the existing capacity allotments of Signatories.²⁸⁴ Comsat states that portability would mean that Comsat would be forced to surrender INTELSAT capacity which it has already reserved for its own use under long-term "take or pay" contractual commitments to INTELSAT. Comsat states that neither the Commission nor any other national regulatory authority has the ability to abrogate the service arrangements between INTELSAT and its Signatories.²⁸⁵ Finally, Comsat argues that other cases of portability are not comparable. It asserts that 800 number portability and local number portability are not similar to direct access, as capacity on INTELSAT satellites is entirely fungible with capacity on rival satellite or cable systems.²⁸⁶

128. We find that the record in this proceeding does not support at this time requiring the portability of INTELSAT space segment capacity controlled by Comsat. The proponents of portability have provided no evidence to support their contention that INTELSAT will be unable to provide sufficient capacity to U.S. direct access customers. Absent evidence that INTELSAT has insufficient capacity, we do not wish to interfere with Comsat's service agreements with INTELSAT. We would, however, be concerned if Comsat control of INTELSAT space segment capacity effectively denies U.S. carriers and users the benefits of direct access, or if Comsat moves to increase its control of INTELSAT capacity in order to deny availability of capacity to U.S. direct access users. We therefore may revisit this issue if there is evidence of insufficient capacity available to direct access customers or that Comsat is using its Signatory status to buy future or additional INTELSAT space segment capacity without any U.S. customer requirements. If INTELSAT capacity proves insufficient to serve U.S. direct access user needs because Comsat acquires capacity available for U.S. service, direct access users should first pursue commercial solutions with Comsat to resolve the matter. We would entertain

²⁸⁰ MCI WorldCom comments at 29, *citing* 47 U.S.C. § 201(c)(2).

²⁸¹ MCI comments at 30.

²⁸² Comsat reply at 5 and 56.

²⁸³ *Id.* at 57.

²⁸⁴ Lockheed Martin reply at 17.

²⁸⁵ Comsat reply at 65.

²⁸⁶ *Id.* at 64-65.

petitions for a regulatory solution if commercial solutions are unavailable and the full benefits of direct access are denied to U.S. users of INTELSAT. We also would entertain such petitions if the benefits of direct access are denied to U.S. users following privatization of INTELSAT.

(7) Potential Effects on INTELSAT Privatization

129. INTELSAT is now in the process of deciding whether and how to change from an intergovernmental cooperative to a private commercial enterprise. Privatization is a goal supported by the United States. The parties in this proceeding express firm support for privatization. Some parties, however, contend that Commission action permitting direct access would undermine U.S. efforts to privatize INTELSAT and state that, in any event, privatization will achieve the goals that we are seeking in this proceeding. Other parties dispute these contentions and urge us to move forward with direct access. INTELSAT regards direct access in the United States as a domestic matter and therefore does not take a position on whether the United States should permit direct access. It firmly states, however, that privatization "will continue to proceed on an accelerated basis, in all circumstances."²⁸⁷

130. Comsat and Lockheed Martin both maintain that Commission action permitting Level 3 direct access would place in jeopardy the U.S. policy goal to privatize INTELSAT. Comsat argues that: (1) direct access is the principle leverage the U.S. has in the privatization process; (2) U.S. carriers taking advantage of direct access could directly influence the privatization process in favor of their cable interests; and (3) non-compensatory prices attributable to direct access users may require Comsat to reduce its current investment share and lose influence in INTELSAT.²⁸⁸ Lockheed Martin maintains that we should only go forward with direct access if such action would help secure a pro-competitive restructuring of INTELSAT, and argues Commission action permitting direct access would have a deleterious impact on U.S. efforts to achieve this end.²⁸⁹ Lockheed Martin urges that we not pursue direct access, but rather use the record developed in this proceeding to refine U.S. objectives with respect to INTELSAT privatization.²⁹⁰ Columbia also contends that INTELSAT's access to the U.S. market provides the U.S. leverage in privatization discussions which should not be given to INTELSAT until it completes the process of privatizing in a manner that does not distort competition.²⁹¹

²⁸⁷ INTELSAT reply at 8.

²⁸⁸ Comsat comments at 69-73; See also "An Economic Assessment of the Risks and Benefits of Direct Access," prepared for Comsat by Professors Jerry R. Green and Hendrick S. Houthakker, Harvard University and Johannes P. Pfeflenberger, the Brattle Group, December 21, 1998, at 17-21.

²⁸⁹ Lockheed Martin comments at 14; reply comments at 7-10.

²⁹⁰ *Id.* at 16.

²⁹¹ Columbia comments at 8.

131. Other parties contend that Commission action permitting direct access would not adversely affect efforts to privatize INTELSAT. They state that they support privatization of INTELSAT and collectively argue that: (1) direct access in the United States would not be inconsistent with nor delay privatization; (2) Comsat's influence in INTELSAT would not be reduced and may be increased as a result of Level 3 direct access; (3) claims that other INTELSAT signatories may forego support for privatization if direct access becomes available in the United States are unsupported and speculative; (4) initiation of direct access in the United States may speed up privatization; (5) claims that U.S. carriers would have incentive to influence INTELSAT to delay privatization are misplaced in view of the additional benefits privatization will entail; and (6) the only result of delaying direct access pending future privatization would prolong Comsat's current monopoly and deny U.S. carriers and users the benefits of direct access available in other countries.²⁹²

132. INTELSAT asserts that its Management and Board of Governors "are actively considering, on an accelerated basis, options for continued restructuring and privatization."²⁹³ INTELSAT has been making significant progress toward privatization since the closing of the formal pleading in this proceeding on January 29 of this year. In March, the INTELSAT Board of Governors authorized INTELSAT Management to focus on privatization as opposed to non-privatization restructuring options and prepare detailed analysis of privatization options to be presented at the June Board meeting.²⁹⁴ In April, the INTELSAT Meeting of Signatories endorsed the Board's continuing focus on privatization options. The Meeting of Signatories confirmed the need for INTELSAT to restructure as early as possible, and requested the Board to perform studies that will enable it to select in September 1999 a single restructuring option for recommendation to the October 1999 Assembly of Parties meeting. At its June meeting, the Board and INTELSAT management committed to an intensive multi-level schedule focused on fleshing out a "corporate" structure and developing a detailed business plan for the September 1999 Board of Governors meeting.²⁹⁵

²⁹² See AT&T reply comments at 14; BT North America reply comments at 25-26; Ellipso comments at 12-13; GE American comments at 12-14 and reply comments at 10-11; Globecast reply comments at 5; ICG reply comments at 8-9; MCI comments at 23-24 and reply comments at 25-27; and Network reply comments at 11-12. See also letter from Satellite Users Coalition (AT&T, MCI Worldcom and Sprint) dated May 21, 1999 attaching testimony of AT&T, MCI Worldcom and Sprint submitted to the Senate Committee on Commerce, Science, and Transportation, Subcommittee on Communications, dated April 30, 1999; and letter on behalf of BT North America, dated May 3, 1999, attaching testimony of BT submitted to the Senate Committee on Commerce, Science, and Transportation, Subcommittee on Communications, dated March 25, 1999.

²⁹³ INTELSAT reply comments at 8.

²⁹⁴ Comsat Report to the U.S. Government on the 126th Meeting of the INTELSAT Board of Governors, March 29, 1999.

²⁹⁵ Comsat Report to the U.S. Government on the 127th Meeting of the INTELSAT Board of Governors, June 23, 1999.

133. INTELSAT's Director General has made it clear that "it is global market forces that compel commercialization and privatization of INTELSAT" and that "privatization should go forward because it is necessary for INTELSAT's survival in the increasingly competitive market that we face."²⁹⁶ The United Kingdom Signatory representative, who served as the Board of Governors Chairman from June 1998 to June, 1999 states that "direct access and privatization are separate issues," and that he is "not aware of any evidence suggesting that these issues are linked in the records of any other INTELSAT Signatory or Party."²⁹⁷ He further states:

BT strongly believes that implementation of direct access in the United States would send a positive signal to INTELSAT members regarding the whole privatization process. With over 90 countries having already implemented some form of direct access, there is considerable confusion around the world regarding the apparent reticence of the United States to do likewise. The overall U.S. policy approach and recent WTO commitments favoring open markets and competitive provision of telecommunications facilities and services only serve to underline this confusion.²⁹⁸

Finally, in testimony before Congress, the Administration, while noting early statements by some Signatories that privatization may be less urgent if direct access becomes available in the United States, believes "the overall risk to privatization is small."²⁹⁹

134. The record before us, however, provides no credible basis to conclude that permitting Level 3 direct access in the United States to U.S. carriers and users unaffiliated with INTELSAT Signatories will slow down or otherwise adversely affect the progress being made toward INTELSAT privatization. There is nothing in either the Board or Meeting of Signatories record of decisions that indicates that progress toward this goal would cease if direct access becomes available to users in the United States to U.S. entities. Nor do we agree with Comsat that Level 3 direct access somehow will imbue U.S. carriers with such influence within INTELSAT that they will be able to threaten the privatization process. U.S. carriers have made clear their support for privatization of INTELSAT -

²⁹⁶ Testimony of Conny Kullman, Director General and CEO of INTELSAT, before Senate Committee on Commerce, Science and Transportation, Subcommittee on Communications, March 25, 1999 at 3.

²⁹⁷ See March 28, 1999 Testimony of Richard Vos, British Telecommunications at 3.

²⁹⁸ *Id.*

²⁹⁹ See Statement of Administration Position by Ambassador Vonya B. McCann, United States Coordinator, International Communications and Information Policy, Department of State, before Senate Committee on Commerce, Science and Transportation, Subcommittee on Commerce, dated March 25, 1999, at p.5. At the September 1998 Board of Governors meeting, a few signatories, with small investment shares in INTELSAT, made statements linking direct access and privatization. These comments have not since then been repeated and signatories have supported subsequent Board and Meeting of Signatories decisions to develop privatization recommendations for the Assembly of Parties.

based on the benefits they foresee from privatization. Comsat presents no convincing evidence that the cable interests of U.S. carriers would give them incentive to act inconsistently with their public statements. Signatories within INTELSAT also have cable investment interests and, as we have described, are supporting INTELSAT privatization. Moreover, even if U.S. carriers had both the incentive and opportunity, it is doubtful that they could successfully harm the privatization process given the support for privatization by INTELSAT, its Signatories and the U.S. government including the Executive Branch and this Commission.³⁰⁰

135. In addition, we reject Comsat's argument that Level 3 direct access to U.S. carriers and service providers may require Comsat to reduce its ownership share in INTELSAT as a result of non-compensatory costs and therefore lose influence in the organization. First, as discussed above, we are providing for a surcharge to enable Comsat to recover Signatory-related costs not recoverable through INTELSAT's Level 3 direct access regime. Second, Level 3 direct access may result in an increase in Comsat's voting share on the Board of Governors if it results in an increase in overall U.S. traffic on INTELSAT. This is because all INTELSAT traffic generated by U.S. direct access users would be attributed to Comsat for purposes of voting on the Board of Governors as the U.S. Signatory. To the extent direct access promotes additional use of INTELSAT for U.S. traffic beyond Comsat's current proportionate use of capacity, Comsat's voting power on the Board would increase. Comsat recently increased its ownership share in INTELSAT beyond the level of ownership that would be attributable to U.S. traffic generated over INTELSAT,³⁰¹ with the expectation of "a strong return on this investment."³⁰²

136. Additionally, we do not agree with Lockheed Martin that the appropriate standard for permitting direct access is whether it will help secure a pro-competitive privatization of INTELSAT. The appropriate standard is the public interest. We have found that there would be public interest benefits in permitting Level 3 direct access. We are also unpersuaded by Lockheed Martin's argument that we can best achieve our policy goals in this proceeding through the INTELSAT privatization process.³⁰³ We believe that a privatized INTELSAT should be free to provide service to U.S. carriers and users, as well as to enter into non-exclusive, non-preferential distribution agreements as may be

³⁰⁰ The Administration is on record as favoring privatization and Congress is considering legislation requiring privatization. See Statement of Administration Position, March 25, 1999.

³⁰¹ The INTELSAT Operating Agreement permits Signatories to invest in INTELSAT beyond their utilization rate in the system to cover investment that other Signatories do not desire to take up based on their usage share. See INTELSAT Operating Agreement, Article 6.

³⁰² Comsat News Release, "Comsat Increases Ownership of INTELSAT System," dated March 30, 1999, quoting statement from Betty C. Alewine, President and CEO, Comsat Corporation.

³⁰³ Lockheed Martin reply at 3.

commercially appropriate.³⁰⁴ Access to the system is an issue that will be subject to negotiation as privatization discussions in INTELSAT move forward. There is no reason, however, to deny U.S. carriers and users the benefits they may find available at this time through Level 3 direct access under the terms we are outlining in this decision. We conclude that U.S. customers should not have to wait to exercise this choice.

B. Legal Issues

137. The *Notice* also requested comment on two legal tentative conclusions that: (1) the Commission has authority to permit United States carriers and users Level 3 direct access to INTELSAT; and (2) that exercising our discretion to permit direct access would not violate the "takings" provision of the Fifth Amendment. In light of the record developed in this proceeding on those issues, we affirm the tentative conclusions reached in our *Notice*.

(1) Commission Authority Under the Satellite Act of 1962

(a) Background

138. The Satellite Act declares it the policy of the United States to establish a commercial communications satellite system with global coverage "in conjunction and in cooperation with other countries."³⁰⁵ It directs that "care and attention" be directed toward providing services to economically less developed countries and areas, as well as more highly developed countries.³⁰⁶ The Satellite Act provides that "United States participation in the global system shall be in the form of a private corporation subject to appropriate government regulation."³⁰⁷ That corporation -- Comsat -- is required to "be so organized and operated as to maintain and strengthen competition in the provision of communications services to the public."³⁰⁸ The Satellite Act also requires that "all authorized users have nondiscriminatory access to the system"³⁰⁹ and that authorized carriers have "nondiscriminatory use of and equitable access to the satellite system."³¹⁰

³⁰⁴ INTELSAT currently is studying options for distribution of INTELSAT services in national markets. It has made no decisions as to a variety of issues associated with distribution agreements.

³⁰⁵ 47 U.S.C. § 701(a). The *Notice* also reviewed the basic provisions of the Satellite Act, which we incorporate by reference. See *Notice*, 13 FCC Rcd at 22022-22024.

³⁰⁶ 47 U.S.C. § 701(b).

³⁰⁷ 47 U.S.C. § 701(c).

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ 47 U.S.C. § 721(c)(2)

139. Additionally, the Satellite Act requires the Commission to exercise certain regulatory functions over Comsat in its administration of the Communications Act, as supplemented by the Satellite Act. Specifically, it empowers the Commission to "make rules and regulations to carry out the provisions of the Satellite Act."³¹¹ The Commission is required to ensure carriers nondiscriminatory use of and equitable access to the system, and regulate the manner in which available facilities are allocated to such uses.³¹² The Commission also is to "prescribe such ratemaking procedures as will ensure that any economies made possible by a communications satellite system are appropriately reflected in rates for public communication services."³¹³

140. The *Notice* stated that the Satellite Act clearly created Comsat to undertake the role as the United States participant in the global satellite system that became INTELSAT -- that role consisting of Comsat's governance and investment in the INTELSAT system. We tentatively found in our *Notice* that: (1) Level 3 direct access would not be inconsistent with Comsat's role as sole U.S. participant in the global system;³¹⁴ (2) provisions in the Satellite Act that authorize Comsat to undertake certain activities, including furnishing "for hire channels of communication," is not expressed in terms of exclusivity;³¹⁵ (3) it is the Federal Communications Commission and not Comsat that is mandated by the Satellite Act to insure "non-discriminatory use of, and equitable access to" the global satellite system;³¹⁶ (4) neither the language nor legislative history of the Satellite Act mandate that Comsat be the sole provider of access to the satellite system;³¹⁷ and (5) permitting Level 3 direct access in the United States would be a permissible exercise of Commission discretion under the

³¹¹ 47 U.S.C. §§ 721(c)(4) and (c)(11). In addition, the Satellite Act places additional requirements on the Commission to: (1) ensure competitive bidding in procurement for the system; (2) upon advice of the Secretary of State, institute proceedings under Section 214(d) of the Communications Act to require establishment of communications links to a foreign point; (3) ensure technical compatibility of system facilities with existing communications facilities; (4) approve system technical characteristics; (5) authorize construction and operation of satellite terminal stations; (6) authorize Comsat to issue capital stock, borrow money, or assume security obligations; (7) ensure that proposed additions to the system are in the public interest; and (8) in accordance with Section 214 of the Communications Act, require additions to the system where such additions would serve the public interest. See 47 U.S.C. § 721(c).

³¹² 47 U.S.C. § 721(c)(2).

³¹³ 47 U.S.C. § 721(c)(5).

³¹⁴ *Notice*, 13 FCC Rcd at 22022.

³¹⁵ *Id.*

³¹⁶ *Id.* at 22024-22025.

³¹⁷ *Id.* at 22025. See 47 U.S.C. § 701 *et. seq.*

Satellite Act to insure "non-discriminatory use of and equitable access to" the system.³¹⁸ And we further tentatively found that permitting Level 3 direct access would serve the Satellite Act's purpose of promoting growth in communications between the United States and economically less developed countries by promoting competition and expanding user choice for services to those markets.³¹⁹ We tentatively concluded that we do not have authority to permit Level 4 direct access in view of Comsat's statutorily mandated role as the U.S. investor in the global satellite system under the Satellite Act.

141. Of the 18 parties submitting responses to the *Notice*, 13 support the tentative conclusion that we have authority under the Satellite Act to permit Level 3 direct access in the United States.³²⁰ One - Comsat - disagrees with this tentative conclusion while four parties do not directly address the issue of Commission authority to permit direct access.³²¹

142. Comsat maintains that: (1) it was created as the sole participant in INTELSAT and that role includes an exclusive franchise over access to the proposed satellite system;³²² (2) this exclusive franchise is vested through the language, structure, and context of the Satellite Act;³²³ (3) the legislative history of the Satellite Act confirms that an exclusive franchise was granted;³²⁴ (4) the Commission and courts have recognized this exclusive franchise;³²⁵ and (5) contrary to our tentative finding in our *Notice*, the 1978 Maritime Satellite Act, which designates Comsat as the sole operating

³¹⁸ *Notice*, 13 FCC Rcd at 22024-22025. See 47 U.S.C. § 721(c).

³¹⁹ *Notice*, 13 FCC Rcd at 22028-22029. See 47 U.S.C. § 701.

³²⁰ The tentative conclusion is supported by AT&T, BT North America, C&W, Ellipso, GE Americom, Globecast, ICG, IT&E, Loral Orion, MCI WorldCom, Network, PanAmSat and Sprint.

³²¹ Lockheed Martin, Columbia, Three Angels and INTELSAT do not directly address the Commission's tentative conclusions here. Along with its comments, Comsat also filed an analysis of the Satellite Act and its history to support its contention that the Commission lacks authority to permit direct access. See "The FCC Lacks the Statutory Authority to Permit Level 3 Direct Access to the INTELSAT System," filed by Lawrence W. Secret III, William B. Baker, and Rosemary C. Harold of Wiley Rein & Fielding (December 22, 1998) ("Comsat Legal Analysis"). We have also considered Comsat's various *ex parte* filings on these legal issues. We refer to both the comments and legal analysis discussing these issues.

³²² Comsat comments at 4-14; Comsat Legal Analysis at 13-41.

³²³ Comsat comments at 15-23; Comsat Legal Analysis at 42-66.

³²⁴ Comsat comments at 23-27; Comsat Legal Analysis at 13-41.

³²⁵ Comsat comments at 28-29; Comsat Legal Analysis at 67-75.

entity for participation in Inmarsat, confirms that Congress intended in 1962 to grant Comsat an exclusive franchise over access to INTELSAT.³²⁶

143. The parties supporting our tentative conclusion generally agree that the Satellite Act confers upon Comsat the right to be the sole United States "participant" in the global satellite system that became INTELSAT.³²⁷ There is disagreement, however, on the scope of Comsat's exclusive role. BT North America and C&W believe that exclusive participation is limited to Comsat's role as the U.S. government representative in INTELSAT, which includes participating on the Board of Governors, the Meeting of Signatories, and related functions. They assert that it does not include the right to exclusive ownership or investment in the INTELSAT system. They therefore urge us to reconsider our conclusion in the *Notice* that the Satellite Act does not authorize the allowance of Level 4 direct access.³²⁸

144. All of these parties agree with our tentative conclusion that the Satellite Act does not give Comsat exclusivity in access to the global satellite system, INTELSAT. They collectively contend that: (1) the plain language and context of the Act do not give Comsat exclusive access to INTELSAT;³²⁹ (2) the legislative history of the Satellite Act does not support a conclusion that Comsat has exclusive access to the system;³³⁰ (3) provisions in the Satellite Act requiring the Commission to ensure "non-discriminatory use of and equitable access to" the satellite system empower the Commission to permit Level 3 direct access;³³¹ (4) the Commission has discretion to permit direct access in the United States based on circumstances that exist today;³³² (5) the 1978 Maritime Satellite

³²⁶ Comsat comments at 30-32; Comsat Legal Analysis at 76-86. See 47 U.S.C. § 751.

³²⁷ See 47 U.S.C. §§ 731-735.

³²⁸ BT North America comments at 16 and C&W comments at 10; Globecast reply at 2-3. See also AT&T reply at 6-7; MCI WorldCom reply at 4-5.

³²⁹ AT&T comments at 4-5; reply comments at 2-7; BT North America at 14-18; reply comments at 9-11; C&W comments at 6-7; Ellipso comments at 5; GE Americom comments at 4; Globecast comments at 2; ICG comments at 2-3; IT&E comments at 3; Loral Orion comments at 7; MCI WorldCom comments at 4; Network comments at 15-16 and reply comments at 3-4; PanAmSat reply comments at 2-3; Sprint comments at 3.

³³⁰ AT&T reply at 8-11; BT North America reply at 12-13; GE Americom comments at 4-5 and reply at 3; IGC reply at 2; MCI WorldCom reply at 6-8; Network comments at 14-16 and reply at 4-6.

³³¹ AT&T comments at 3 and reply at 2-4; BT North America comments at 12-13; C&W comments at 7; GE Americom comments at 4; Globecast comments at 2; Loral Orion comments at 2; MCI WorldCom comments at 5-7 and reply at 4-6; Sprint comments at 4.

³³² AT&T comments at 2-3 and reply at 2-7; BT North America comments at 9-14 and reply at 5-9; C&W comments at 7; GE Americom comments at 4; Ellipso comments at 5-6; Globecast comments at 2; Loral Orion comments at 1; MCI WorldCom comments at 3-7 and reply at 6; Network comments at 15; PanAmSat comments at 3-4; Sprint comments at

Act confirms that Comsat was not granted exclusive access to the satellite system in 1962³³³ and no previous Commission nor court decision has held that the Commission does not have authority under the Satellite Act to permit direct access.³³⁴

145. In construing whether the Satellite Act permits direct access to INTELSAT satellites from the United States by entities other than Comsat, we first look to the relevant language of the governing statute.³³⁵ Analysis of the statutory language includes determining "whether Congress has spoken directly to the precise question at issue."³³⁶ This inquiry may be characterized as a search for the plain meaning of the statute. If after "employing traditional tools of statutory construction . . . the intent of Congress is clear, that is the end of the matter."³³⁷

146. On the other hand, if "Congress has not directly addressed the precise question at issue" or "if the statute is silent or ambiguous with respect to the specific issue," the agency's interpretation should be "based on a permissible construction of the statute."³³⁸ This inquiry is applicable in situations where Congress has not expressed itself unequivocally or where a specific provision is ambiguous. As to what would be a "permissible construction" of a statute, the courts have given

3.

³³³ BT North America reply at 20-21; C&W comments at 7; Ellipso comments at 6; GE Americom comments at 5; ICG reply at 3-4; Network comments at 16.

³³⁴ BT North America reply at 17-19; C&W comments at 7-8; GE Americom comments at 6-7; ICG reply at 4-5; MCI World Com comments at 6 and reply at 7-8; Network reply at 6-9; PanAmSat comments at 4; Sprint comments at 5-6.

³³⁵ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*").

³³⁶ *Chevron*, 467 U.S. at 842.

³³⁷ The traditional tools of statutory construction may include an examination of the statute's text, structure, purpose, and legislative history. See *Chevron* 467 U.S. at 842-43 (an agency must give effect to the "unambiguously expressed intent of Congress"). See also *Bell Atlantic Tele. Co. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997) ("*Bell Atlantic*"); *Natural Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (quoting *Chevron*, 467 U.S. at 843 n.9); *Hammontree v. NLRB*, 894 F.2d 438, 441 (D.C. Cir. 1990) (deference by a court or regulatory agency would not be appropriate in this situation); *Southern Cal. Edison Co. v. Fed. Energy Regulatory Comm.*, 116 F.3d 507, 515 (D.C. Cir. 1997); *First Nat'l Bank & Trust Co. v. Nat'l Credit Union*, 90 F.3d 525, 529-30 (D.C. Cir. 1996). In *Bell Atlantic*, the Court indicated that legislative history may prove useful in determining if the text and purpose of the statute is clear. In that case, two provisions appeared unclear. Although the court concluded that the statutory provision at issue was ambiguous it referred to the legislative history in determining whether the Commission's interpretation of the ambiguous statutory provision was reasonable.

³³⁸ *Chevron*, 467 U.S. at 843.